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February 10, 2006

VIA FEDEX

Marlene Dortch, Secretary
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992; MB Docket No. 05-311

Dear Ms. Dortch:

Enclosed for filing in the above-referenced matter, please find the original plus four copies of *Initial Comments of the Public Cable Television Authority ("PCTA"); Cities of Canyon Lake, Chino, Duarte, Encinitas, Glendale, Hawthorne, Irvine, Laguna Beach, Laguna Niguel, La Palma, La Quinta, Moreno Valley, San Clemente, Santa Cruz, Torrance, Twentynine Palms, California and the Counties of San Diego and Santa Cruz, California.* I have also enclosed one additional copy of our Comments which I respectfully request you conform and return to me in the postage prepaid envelope provided.

If you have any questions, please do not hesitate to contact me at (714) 641-5100 extension 1316.

Sincerely,

RUTAN & TUCKER, LLP

Valerie Bloom

Valerie Bloom
Assistant to William M. Marticorena

VB
Enclosures

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BEFORE
THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter Of: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	MB Docket No. 05-311

INITIAL COMMENTS OF THE PUBLIC CABLE TELEVISION AUTHORITY ("PCTA"); CITY OF CANYON LAKE, CALIFORNIA, CITY OF CHINO, CALIFORNIA, CITY OF DUARTE, CALIFORNIA, CITY OF ENCINITAS, CALIFORNIA, CITY OF GLENDALE, CALIFORNIA, CITY OF HAWTHORNE, CALIFORNIA, CITY OF IRVINE, CALIFORNIA, CITY OF LAGUNA BEACH, CALIFORNIA, CITY OF LAGUNA NIGUEL, CALIFORNIA, CITY OF LA PALMA, CALIFORNIA, CITY OF LA QUINTA, CALIFORNIA, CITY OF MORENO VALLEY, CALIFORNIA, CITY OF SAN CLEMENTE, CALIFORNIA, CITY OF SANTA CRUZ, CALIFORNIA, CITY OF TORRANCE, CALIFORNIA, CITY OF TWENTYNINE PALMS, CALIFORNIA, COUNTY OF SANTA CRUZ, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA

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I. SUMMARY OF ARGUMENTS.

The Commission possesses limited, if any, jurisdiction to preempt local franchising of cable operators which utilize public rights-of-way ("PROW") to provide video services. Section 621(a)(1) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act")[1] provides neither general authority to the Commission to preempt local franchising procedures and processes nor sanctions the adoption of prescriptive "guidelines" which structurally impede the authority of local franchising authorities, through their legislative bodies, to exercise the legislative discretion inherent in the franchising process. Local government possesses historic authority grounded in state law to regulate the use of its PROW for all purposes including the franchising of various forms of communications services. Any federal preemption must be express in that the law does not infer preemptive authority over local control of PROW due to the constitutional limitations of the Fifth, Tenth and Eleventh Amendments to the United States Constitution. Federal law does not create local regulatory rights but simply recognizes their existence. It limits those rights only in certain express situations.

Congress attempted to strike a careful balance between the rights of local government and the federal government in developing the Communications Act of 1934, as amended (the

[1] Pub. L. No. 102-385, 106 Stat. 1460.

"Communications Act" or the "Act"). Congress recognized that local government possessed the inherent authority to franchise, regulate, and impose reasonable conditions upon communication users of PROW with minimal federal intervention or interference. Title VI of the Communications Act does not grant regulatory authority to local government, but rather recognizes its historic and legitimate existence. To the extent that Congress specifically envisioned the retention of local rights in relation to video providers utilizing PROW, the Commission cannot undo this carefully balanced "structural dualism" regulatory scheme by utilizing a simple and straight forward Congressional directive to local franchising authorities, as opposed to the Commission, not to unreasonably refuse to award an additional competitive franchise.[2] Local government possesses the inherent and unabridgeable right based upon existing federal and state statutory law to require cable operators to obtain a franchise to use and occupy the PROW to provide Cable Services. The exercise of this preexisting state or charter conferred right to franchise and regulate video providers utilizing PROW is implemented through the exercise of the legislative discretion of locally elected governing bodies. Section 621(a)(1) constituted a specific prohibition upon a specific type of conduct with a specific remedial process (i.e., "appeal such final decision pursuant to the provisions of Section 635") and was not intended by Congress to constitute general preemptive authority on the part of the Commission to eliminate local franchising, significantly curtail local franchising, or interfere with the recognized legislative discretion of local government in awarding cable franchises.

II. IDENTIFICATION OF PARTIES.

The PCTA constitutes a joint powers authority created pursuant to California law vested with the responsibility to franchise and regulate cable television within the jurisdictional limits of

[2] 47 U.S.C. Section 541(a)(1).

the Cities of Fountain Valley, Huntington Beach, Stanton, and Westminster, all located in Orange County, California.[3] The remaining members of the California Franchising Authorities constitute government entities formed pursuant to California law which possess the authority and responsibility to franchise and regulate cable television operations within their jurisdictional boundaries.[4] The California Franchising Authorities are located in Los Angeles County, Orange County, Riverside County, San Bernardino County, San Diego County and Santa Cruz County, and constitute a representative cross-section of local government in California.

III. LIMITATIONS UPON COMMISSION AUTHORITY TO PREEMPT LOCAL FRANCHISING OF VIDEO PROVIDERS WHICH UTILIZE THE PROW.

A. Preemption of Local Authority Over Cable Services, and Those Facilities Which Provide Cable Services by the Commission Must be Narrowly Focused and Based Upon Concrete, Measurable, and Explainable Evidence.

It is axiomatic that a reviewing court may not substitute its judgment for that of the Commission. (*Citizens to Preserve Overton Park, Inc. v. Volp*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). However, judicial review of the Commission's decision must be "searching and careful," *Id.*, must ensure that both the Commission has adequately considered all relevant factors and that it has demonstrated a "rational connection between the facts found and the choices made." (*Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct.

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[3] The PCTA was formed in the 1970's to provide a reasonable approach to the franchising and regulation of cable television in four contiguous Orange County cities. The PCTA is governed by a Board of Directors which consists of two elected representatives of each of its member cities. The sole function of the PCTA is to provide regulatory supervision over cable operations within the jurisdictional boundaries of its member cities. All cable regulatory responsibility has been delegated by its member cities to the PCTA. The PCTA is also filing individual comments.

[4] Local government is authorized by California Statute to franchise and regulate cable television pursuant to California Government Code Section 53066, *et seq*. Cable television does not constitute a public utility in California (*Television Transmission, Inc. v. Public Utilities Com.*, 47 Cal.2d 82, 301 P.2d 862 (1956)) and thus the California Public Utilities Commission ("CPUC") exercises no jurisdiction over cable television except in relation to certain cable television construction practices which affect other utility infrastructure.

239, 246, 9 L.Ed.2d 207 (1962)). Although the standard of review is deferential, it may not be uncritical. When an administrative agency, such as the Commission, reverses prior long-standing practice (i.e., non-preemption of local franchising and regulation of Cable Service), the agency must provide a clear, well-founded, and reasonable analysis indicating that prior policies and standards are being deliberately changed and not casually ignored. (*People of State of California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994); *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43-44, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983)). If the record reveals that the Commission "failed to consider an important aspect of the problem or has offered an explanation for its decision that runs counter to the evidence before [it]," the Court must find the Commission in violation of the Administrative Procedures Act ("APA"). (*California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990)).[5]

In reviewing the decisions of constitutional dimension, such as the Commission's potential intrusion upon state and localities' rights pursuant to the Fifth, Tenth and Eleventh Amendments, substantial deference pursuant to *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) is inappropriate since its application would raise serious constitutional questions. (*Rust v. Sullivan*, 500 U.S. 173, 190-91, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Edward J. DeBartolo Court. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576-78, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir., 1999)). When faced with a statutory interpretation that "would raise serious constitutional problems the [courts] will construe the

[5] In reviewing Commission action, a Court can only consider grounds set forth by the Commission in its action and cannot create permissible bases for affirmance in the absence of the Commission's articulation thereof. (*National Cable Television Association, Inc. v. FCC*, 914 F.2d 285, (D.C. Cir. 1990); *Northwestern Indiana Tl. Cl. v. FCC*, 824 F.2d 1205, 1210 (D.C. Cir. 1987), cert denied, ___ U.S. ___, 110 S.Ct. 575, 107 L.Ed.2d 773 (1990)).

statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (*DeBartolo Court.*, 485 U.S. at 575, 108 S.Ct. 1392). Any action of the Commission preempting local authority over the regulation of video utilizers of PROW, or the regulation of their facilities, would present serious constitutional questions and thus the Commission is owed no deference even if said regulations are reasonable. Rather, the "Rule of Constitutional Doubt" is applied. (*U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999)).

B. The Authority of the Commission to Preempt, Curtail, or Proscribe State and Local Regulation of Cable Services is Extremely Limited and Must be Based Upon a Showing that the Absence of Said Preemption Would Interfere, in a Concrete and Demonstrable Manner With Clearly Articulated Federal Objectives.

Any final decision made by the Commission regarding its own power to preempt local regulation is reviewable *de novo* by the United States Court of Appeals. (*28 U.S.C.A.* Section 2342(1)). The Supreme Court has refused to accord any special weight to the Commission's determination that certain state regulations were preempted and has rejected, based upon an absence of compelling evidence, the Commission's contention that preemption was necessary to fulfill its statutory obligation. (*Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374-75, 106 S.Ct. 1890, 1902, 90 L.Ed.2d 369 (1986)). As the Fifth Circuit has stated:

> "It is well established that courts need not refer an issue to an Agency when the issue is strictly a legal one, involving neither the Agency's particular expertise nor its fact finding prowess; the standards to be applied in resolving the issue are within the conventional competence of the courts and the judgment of the technically expert body is not likely to be helpful in the application of these standards to the facts of the case."

(*Columbia Gas Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503, 519 n. 15 (5th Cir. 1981).

The primary, if not sole, basis of the Commission's organic authority over Cable Services and Cable Operators is set forth in Title VI of the Communications Act. Although the California Franchising Authorities acknowledge that the Commission does possess certain grants of inherent authority,[6] the Commission's general jurisdiction, regardless of its situs within the Communications Act, "is restricted to that reasonably ancillary to the effective performance of [its] various responsibilities" under Title VI of the Act. (*United States v. Southwestern Cable Co.*, 39 U.S. 157, 178, 88 S.Ct. 1994, 205, 20 L.Ed.2d 1001 (1968); *see also, FCC v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32 L.Ed.2d 390 (1972)). Although the Commission's ancillary powers may or may not be expansive under the Act depending on the circumstances, those ancillary powers do not include the "untrampled freedom to regulate activities over which the statute fails to confer, or expressly denies, Commission authority." (*National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976)).

Cable franchising has developed under the watchful regulatory eye of local government since its inception. It is extremely clear that the legacy of franchising developed with the knowledge and approval of Congress and the Commission. Although the California Franchising Authorities do not dispute the notion that the Commission has the authority, assuming consistency with statute, to change its regulatory mind, it is incumbent upon the Commission in doing so to demonstrate that it has examined the relevant data and articulated a clear and precise

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[6] The Commission's inherent grants of authority can be found in various places. For example, the Commission has general regulatory jurisdiction over "all interstate and foreign communications by wire or radio. . . and . . . all persons engaged with the United States in such communications (except for communications of the Canal Zone). *Id.* at 152(a)). In addition, the Commission is empowered by Section 1 of the Act "to execute and enforce the provisions of this Act" (47 U.S.C. § 151) and by Section 4(i) "to perform any and all acts, making such rules and regulations, and issue such orders not inconsistent with this Act, in the execution of its functions." (47 U.S.C. § 154(i)).

explanation for its policy reversal based upon the merits. (*People of State of California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990). A Commission decision will be overturned if the Commission has "failed to consider an important aspect of the problem" or has "offered an explanation for its decision that runs counter to the evidence before the Agency." (*Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)). Even the traditional deference granted Commission actions does not allow speculation to form the basis for critical Commission actions. (*People of the State of California v. FCC, Id.* at 1236).[7]

Judicial review of agency decisions is particularly critical when the Commission attempts to trample upon traditional domains of local government. Even when Congress preempts an entire field of regulation, "every state statute that had some indirect effect [on that field]. . . is not preempted." (*Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308, 108 S.Ct. 1145, 1155, 99 L.Ed.2d 316 (1988): Federal Energy Regulatory Commission has exclusive jurisdiction over rates and facilities of natural gas companies, but not every law that affects rates and facilities is preempted.) The ultimate question, which must be based on evidence in the administrative record, is whether a local government's regulatory impact upon the deployment of competitive cable services is sufficient to force the conclusion that Congress must have intended to preempt, or provide the Commission with authority to preempt, the type of local regulations in question. (*Cable Television Association v. Finnerman*, 954 F.2d 91, 101 (2nd Cir. 1992)). The Commission may not utilize its general jurisdiction to fill a legislative gap where Congress has expressly

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[7] Unlike "minimum rationality" review under the due process and equal protection clauses, "arbitrary and capricious" review of Commission actions pursuant to the APA do not permit a reviewing court to impute reasons to the Agency and uphold its actions if it has any conceivable rational basis pursuant to articulated or inarticulated reasons. (*People of the State of California v. FCC, Id.* at 1238).

created said gap or no gap is deemed to reasonably exist. (*American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1571 (D.C. Cir. 1987)). Where an area of regulation falls traditionally within the domain of local government, local authority is provided strong deference (*People of State of California v. FCC, Id.*, at 1239-1240)).

The limitation upon preemptive authority of the Commission over activities which involve "national (i.e., interstate) and local (i.e., intrastate) origins and impacts has been historically enforced by the courts. The Commission may only preempt local regulation of telecommunication carriers which involve both interstate and intrastate communications pursuant to what is referred to as the "impossibility" exception carved out of Section 2(b)(1) of the Communications Act in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). Thus, where it can be demonstrated that state regulations cannot feasibly co-exist with the Commission's validly adopted interstate regulations, state regulations may be preempted. However, the "impossibility" exception is an extremely limited one. The Commission may not justify a preemption order merely by showing that some of the preempted state regulation would, if not preempted, frustrate Commission regulatory goals. Rather, the Commission bears the burden of justifying its entire preemption order by demonstrating the order is narrowly crafted to preempt only those state regulations as would negate valid Commission regulatory goals. (*People of State of California v. FCC, Id.* at 1243.) As the D.C. Circuit has held, "a valid FCC preemption order must be limited to [state regulations] that would necessarily thwart or impede" the Commission's goals. (*National Assn. of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989).) Thus, where state and local regulations are protected by Title VI, or otherwise within the Communications Act, the Commission possesses a heavy burden of demonstrating that its regulation of the interstate

aspects of a particular service or series of services would "necessarily be frustrated by all possible forms of related state and local regulations." (*People of the State of California v. FCC*, *Id.* at 1243-44.) An argument that local regulation may, or even will, negate federal purposes in "many" cases does not suffice to justify the blanket preemption or limitation of all local regulation in that subject area. The "impossibility" exception to Section 2(b)(1) is a narrow one that may be invoked only when state and federal regulations cannot feasibly coexist. (*People of the State of California v. FCC, Id.* at 1244.)[8]

IV. SECTION 621(a)(1) OF THE 1992 CABLE ACT DOES NOT PROVIDE THE COMMISSION WITH AUTHORITY TO EITHER PREEMPT LOCAL FRANCHISING OF CABLE OPERATORS PROVIDING CABLE SERVICES OR INTRUDE UPON THE EXERCISE OF LEGISLATIVE DISCRETION IN RELATION TO THE GRANTING OF LOCAL FRANCHISES.

A. Local authority to Franchise and Regulate Cable Operators Providing Cable Services Does Not Emanate From Title VI or Any Other Provisions of the Communications Act.

As a general matter, with a few limited exceptions, Title VI is not a grant of authority to state or local government. Rather, long before Title VI of the Communications Act was enacted, state and local government possessed the right to franchise entities who sought to use and occupy PROW to provide both intrastate and interstate services. In most cases, the Communications Act constitutes a limitation upon local regulatory authority and not the grant thereof. Title VI, relating to cable television, imposes specific limits upon local authority but recognizes, in such provisions as Section 617 relating to transfers as well as other salient provisions, that the foundation of local franchising authority is state law which exists without any form of

[8] The limitation upon federal preemption is particularly acute where Congress has expressly created a "structural dualism" regulatory scheme which contemplates the exercise of legislative authority by local government in relation to certain aspects of cable regulation. Congressional recognition of broad franchising authority on the part of local government through the very fabric of Title VI makes blanket regulation or curtailment of local franchising actions inconsistent with the overall regulatory scheme and thus unlawful.

concomitant federal authorization. Likewise, localities do not need specific or general federal authority to charge fees for the use and occupancy of PROW to provide Cable Services or impose other reasonable conditions. Congress has created a delicate balance between the federal government, on the one hand, and states and localities, on the other, which is premised upon limited federal preemption of an area of law which confers broad authority on states or localities based upon use of PROW. This regime of "structural dualism" constitutes a delicately crafted legislative balance whereby important areas of traditional local concern, such as franchising, was specifically intended by Congress to reside in the hands of state and local government. The Commission cannot alter the balance that Congress intended when it adopted Title VI of the Communications Act. In the absence of Title VI of the Communications Act, local government could still franchise cable systems utilizing PROW, collect franchise fees or other forms of rent for use of the PROW, specify certain operational and construction standards, impose customer service safeguards, and ultimately regulate cable operators in much the same way that state and local governments have been regulating other uses of PROW such as electric utilities, gas utilities, pipeline utilities, and others, for well over 150 years.[9] In relation to the adoption of the Cable Communications Policy Act of 1984, as amended,[10] Congress intended to continue a policy of "reliance on the local franchising process as a primary means of cable television regulation. (Cable Communications Act of 1984, Report of the Committee on Energy and Commerce together with Additional and separate Views on HR 4103, Report 98-934, 1984, (the "1984 House Report"), p. 19.) Congress specifically stated that the ". . .franchise process take

[9] Although Section 621(b(1) does appear to affirmatively require the existence of a franchise as a prerequisite to the provision of cable service, even that statute must be read in the context of Title VI of the Communications Act which recognizes the inherent franchising authority of local government.

[10] Pub.L. No. 98-549, 98 Stat. 2779 (1984).

place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." (1984 House Report, p. 24).

B. Cable Franchising Constitutes a Legislative Act of Local Government Which Must be Afforded Deference by the Commission.

The rule is well settled that no person can acquire the right to make a special or exceptional use of PROW, not common to all citizens of the state, except by grant from the sovereign power. (Municipal Corporations, *McQuillin*, § 34.10.) Franchises, licenses, permits, or some other form of authorization must be obtained prior to utilization of PROW and other public property for purposes other than travel or the enjoyment of benefits common to all citizens. (Municipal Corporations, *McQuillin*, *supra*, at § 34.10; *Schoenfeld v. Seattle*, 265 F. 726 (1920).) If any entity, including a public service company, is not granted the right to utilize the streets of a municipality by a federal statute, the state constitution, a state statute, or by its own charter, it has no right to utilize such streets unless the host governmental entity consents to that use. (Municipal Corporations, *McQuillin*, *supra*, at §34.10.10; *Potter v. Calumet Elec. St. R. Co.*, 158 F. 521 (1908).)

California law specifically recognizes the authority of cities and counties to grant franchises for the construction of public utilities and other matters. ((See Cal. Government Code § 26001; Cal. Government Code § 39732; Cal. Government Code § 53066; Cal. Constitution, Article XII, § 8; *Southern Pacific Pipelines, Inc. v. City of Long Beach,* 204 Cal. App. 3d 660, 666, 251 Cal. Rptr. 411 (1998).) As the California Supreme Court has stated:

> "No principle of law is better settled than that corporate privileges, which are not ordinarily and necessarily an incident of the corporate franchise, can be held to prevail over public rights only when it plainly and explicitly appears that such

privileges have been, in fact, granted." (*Simons Brick Co. v. City of Los Angeles*, 182 Cal. 230, 232 (1920).)[11]

It is firmly established that the granting of a cable franchise constitutes a legislative act. (*Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434, 441 (6th Cir. 1997). California law is in complete accord. (*See Cox Cable San Diego, Inc. v. City of San Diego*, 186 Cal.App.3d 952, 233 Cal.Rptr. 735, 742 (1987); *Orange County Cable Communications Co. v. City of San Clemente*, 59 Cal.App.3d 165, 130 Cal.Rptr. 429, 433 (1976)).[12] Because a franchise award constitutes a legislative act, it cannot, as a matter of the Separation of Powers Doctrine, be overridden in the absence of fraud, collusion, or dishonesty. (*Communications Systems, Inc. v. City of Danville*, 880 F.2d 887, 891 (6th Cir. 1989)).

C. Commission Preemption of Local Cable Franchising is Unlawful.

In *City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999) ("*Dallas*"), the Fifth Circuit struck down the Commission's preemption of local franchising of Open Video System ("OVS") Operators as being in excess of its statutory jurisdiction. In *Dallas*, the Commission attempted to preempt all local and state franchising of OVS Operators pursuant to Section 653(c)(1)(C) of the Telecommunications Act of 1996 ("TCA")[13] which states that, with a few exceptions, Parts III and IV of Title VI shall not apply to OVS Operators. (See 47 U.S.C. § 573(c)(1)(C).) The

[11] The ability to grant or withhold franchises includes the ability to condition said grant, and, absent statutory interference, to extract fees when appropriate. (*People ex rel. Flournoi v. Yellow Cab Co.*, 31 Cal. App. 3d 41, 46, 106 Cal. Rptr. 874 (1973).) Under California law, fees paid for franchises are not taxes, user fees, or regulatory licenses, but rather compensation for the special privilege granted thereby. (*Santa Barbara County Taxpayers Association v. Board of Supervisors*, 209 Cal. App. 3d 940, 950, 257 Cal. Rptr. 615 (1989).)

[12] The Ninth Circuit has recently held that the approval or disapproval of a cable franchise transfer request constitutes a legislative act, accorded substantial judicial deference. In reaching said holding, the Ninth Circuit relied, in part, upon the legislative nature of a franchise renewal decision. (*Charter Communications, Inc. v. County of Santa Cruz*, 304 F.3d 927, 932 (9th Cir. 2002). Although not specifically addressing the issue of franchise grants, the Ninth Circuit's analysis of the renewal context strongly suggests an equivalent finding in relation to an initial franchise grant.

[13] Pub. L. No. 104-104, 100 Stat. 56.

Commission reasoned that included in the Title VI provisions that do not apply to OVS Operators is § 621(b)(1), which provides that, with some minor exceptions, "a cable operator may not provide cable services without a franchise." (47 U.S.C. § 571(b)(1)). Based upon the interplay of these statutory provisions, the Commission reasoned that "any state or local requirements . . . that seek to impose Title VI 'franchise-like' requirements on an OVS Operator would directly conflict with Congress' express direction that OVS Operators need not obtain local franchises as envisioned by Title VI" and thus preempted state and local franchising. According to the Commission, once an OVS Operator has been certified by the Commission, that entity had an enforceable right to access the PROW without any further state and local consent. (*See Implementation of § 302 of the Telecommunications Act of 1996, 2nd Report and Order*, FCC 96-249 (Released June 3, 1996) ("Rule Making Order") p. 211, on Reconsideration, 3rd Report and Order, FCC 96-334 (Released August 8, 1996) ("*Reconsideration Order*") p. 193.)

The *Dallas* court applied *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 476 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("*Chevron*") as the appropriate review standard. (*Id.* at 346.) Notwithstanding the deferential standard of *Chevron*, the Fifth Circuit held that Section 653(c)(1)(C) simply eliminated the federal requirement that a local franchise be obtained but did not preempt or extinguish the inherently local authority of state and local governments to require certain forms of authorizations for access to PROW. As the Court stated:

> "Section 621 states that a cable operator may not provide cable service without a franchise. This amounts to a federal requirement that a cable operator obtain a franchise from a local authority before providing service. Eliminating Section 621 results in the deletion of the federal requirement that cable operators get a franchise before providing service; it does not eviscerate the ability of local authorities to impose franchise requirements, but only their obligation to do so. Consequently, simply stating that Section 621 shall not apply to OVS Operators

> does not expressly preempt local franchising authority, as Section 601(c)(1) requires." (Original emphasis.)

(*Id.* at 347.) Once again, the Fifth Circuit relied upon the fact that PROW franchising constitutes "a power traditionally exercised by a state or local government" in holding that any preemption authority of the Commission in relation to these types of activities must be grounded in ". . . unmistakably clear . . . language of the statute." The actual words of the court are instructive:

> "The FCC's broad reading of preemption authority also conflicts with Supreme Court precedent. In *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), the court held that if Congress intends to preempt a power traditionally exercised by a state or local government, 'it must make its intention to do so "unmistakably clear in the language of the statute."'"

(*Id.* at 460, 111 S.Ct. 2395 (quoting *Will v. Michigan Department of State Police*, 491 U.S. 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

In *Dallas*, the Court found that Congress did not provide the type of clear statement that *Gregory* requires. Because Section 601(c)(1) and *Gregory* prohibit implied preemption, and because Section 653(c)(1)(C) expressly preempts only the federal requirement of a local franchise and not the locality's freedom to impose franchise requirements as it sees fit, the Commission erred in ruling that Section 653 prohibited local authorities from requiring local OVS Operators to obtain a franchise to access the locally maintained rights-of-way:

> ". . . there are persuasive dicta supporting the contrary view that Section 621 merely codified and restricted local governments independently-existing authority to impose franchise requirements. Moreover, the legislative history of the 1984 Cable Act contradicts the Commission's claim that the Act contradicts the Commission's claim that the Act established Section 621 as the sole source of franchising authority. According to the House Report on H.R. 4103, whose terms were later incorporated into S. 66 to become the 1984 Cable Act.
>
> Primarily, cable television has been regulated at the local government level through the franchise process . . . . H.R. 4103 establishes a national policy that clarifies the current system of local, state, and federal regulation of cable television. This policy continues the lines on the local franchising process as a primary means of cable television regulation, while defining and limiting the authority of the franchising authority may exercise through the franchise process."

(*Id.* at 347-48.)

Federal law may not intrude into areas of traditional state and local sovereignty unless the clear language of the federal law compels the conclusion. (*Gregory v. Ashcroft*, 501 U.S. at 460, 111 S.Ct. 2395; *Commonwealth of Virginia v. EPA*, 105 F.3d 1397, 1410, (D.C. Cir. 1997), partial rehearing granted, 116 F.3d 499 (D.C. Cir. 1997); *City of Abilene, Texas, v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).) The power to franchise PROW is traditionally and historically local. Said power should include the right to impose reasonable conditions and receive reasonable compensation for the use of the PROW by way of franchise fees or otherwise. (*See City of Dallas, Texas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997).)

D. Section 621(a)(1), Even When Read in Conjunction With Other Provisions of the Communications Act, Does Not Provide Preemptive Authority Over the Local Franchising Process.

Section 621(a)(1) must be interpreted in the context of its complete language. In 1992, Congress amended Section 621(a)(1) to add the following language:

> "Except that a Franchising Authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of Section 635 for failure to comply with this subsection."

The 1992 amendment to Section 621(a)(1) is not, as preliminarily construed by the Commission, a broad preemptive grant but rather a specific prohibition upon a specific type of conduct with a specific remedy, i.e., judicial review pursuant to Section 635. The express language of Section 621(a)(1) requires that its application be triggered by a "final decision" of the franchising authority. Likewise, Section 635(a) requires a "final determination made by a franchising authority" as a condition of judicial ripeness. Thus, Section 621(a)(1), read in proper

context, simply creates a specific substantive limitation upon franchising authority and a process, intended to go hand in hand therewith, whereby "final decisions" of the local franchising authority can be judicially tested. In fact, this statute delegates no authority, whether pre-decision or post-decision, to the Commission. The specific language of the statute requiring a "final decision" strongly suggests that the sole appropriate remedy for a cable operator who believes that its franchise application has been "unreasonably refused" is recourse to the judicial system pursuant to Section 635. The sanctity of the legislative process relating to local franchising, which has been consistently recognized by Congress and the Commission even prior to the adoption of the 1984 Cable Act, strongly suggests that Congress did not intend Section 621(a)(1) to constitute a prophylactic grant of power to the Commission to interfere in the legislative process of franchise awards.

The *Dallas* decision strongly argues against the Commission's use of the general language of Section 1 and Section 4(i) of the Communications Act as preemptive authority. At least in *Dallas*, the Commission possessed colorable specific authority pursuant to Section 653(c)(1)(C) to justify preemption.[14]

[14] It is interesting to note that the Commission did not attempt to rely upon its general "ancillary jurisdiction" pursuant to either Title II or Title VI of the Communications Act to justify its wholesale disablement of local franchising of OVS Operators in *Dallas*. However, it is reasonable to conclude that the statutory authority cited by the Commission in *Dallas* to preempt local franchising of OVS Operators' use of PROW was far more compelling than the extremely generalized language contained in Sections 1 and 4(i) of the Communications Act cited by the Commission in the NPRM (pps. 9-10, ¶ 15). However, the Fifth Circuit in *Dallas* did not find even more arguably concrete authority contained within the Communications Act sufficient to justify the elimination of the historic power of local government to regulate access to their PROW through the legislative franchising process.

Dated: February 10, 2006

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Valerie Bloom hereby certify that I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On February 10, 2006, I caused the original and four (4) copies of the within *INITIAL COMMENTS OF THE PUBLIC CABLE TELEVISION AUTHORITY ("PCTA"); CITIES OF CANYON LAKE, CHINO, DUARTE, ENCINITAS, GLENDALE, HAWTHORNE, IRVINE, LAGUNA BEACH, LAGUNA NIGUEL, LA PALMA, LA QUINTA, MORENO VALLEY, SAN CLEMENTE, SANTA CRUZ, TORRANCE, TWENTYNINE PALMS, CALIFORNIA AND THE COUNTIES OF SAN DIEGO AND SANTA CRUZ, CALIFORNIA* to be filed with Marlene, Dortch, Office of the Secretary of the Federal Communications Commission via Federal Express for morning delivery, as more particularly described as follows:

Marlene Dortch, Commission Secretary (original plus 4 copies)
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

John Norton (1 copy)
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Andrew Long (1 copy)
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed this 10th day of February, 2005 at Costa Mesa, California.

Valerie Bloom

Valerie Bloom